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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-909

EUGENE SMALDONE, aka CHECKERS, aka MOSES; EUGENE LOUIS SMALDONE, aka YOUNG GENE, aka HUGH; LEO EDWARD LANE; JOSEF RICHARD ERNER, aka JOSEPH, aka RICK; and HARRY ANTHONY VILLANO,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

FLYNN KIMERER THINNES & GALBRAITH
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PETITION FOR REHEARING

Petitioners herein respectfully move this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on April 15, 1974, and (2) granting the petition. As grounds for this petition, petitioners state the following:

I. *THE TRIAL COURT SHOULD HAVE GRANTED DEFENSE MOTIONS TO SEVER DEFENDANTS BECAUSE DEFENDANTS' ACTS DID NOT REFLECT A UNITARY CONSPIRACY.*

It is the position of petitioners that the trial court improperly denied the defendants' Smaldone motions to sever the trial of each of the defendants brought pursuant to Rules 8(b) and 14 of the Federal Rules of Criminal Procedure. Reliance is placed upon the decision in *United States v. De Cesaro*, 54 F.R.D. 596 (E.D. Wisc. 1972), a 18 U.S.C. § 1955 prosecution involving eleven co-defendants. It is submitted that the same considerations and factors which led the *De Cesaro* Court to conclude that severance was proper are present in the instant case.

II. *THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY ON THE ISSUE OF REASONABLE DOUBT.*

It is submitted that the trial court improperly instructed the jury on the burden of proof required to be sustained in a criminal case by charging as follows:

> "A reasonable doubt is a doubt based upon reason and common sense. It is rarely possible to prove anything to an absolute certainty. Proof beyond a reasonable doubt is established if the evidence is such that you would be willing to rely and act upon in the more important of your own personal affairs." (T. 1315-1316)

The above-quoted instruction is improper. In *Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954), the Supreme Court specifically renounced a similar instruction that reasonable doubt was "the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon." (348 U.S. at 140). In reaching this conclusion, the Supreme Court held that the charge should have been in terms of "the kind of doubt that would make a person hesitate to act . . . rather than the kind on which he would be willing to act."

A similar instruction was rejected by the United States Court of Appeals for the District of Columbia in *Scurry v. United States,* 347 F.2d 468 (C.A.D.C. 1965). In both the *Scurry* and *Holland* decisions, the Court looked to the entirety of the trial judge's instructions in determining that the erroneous reasonable doubt instruction did not constitute reversible error. In *Scurry,* the Court held that such an instruction did not constitute reversible error in view of the trial judge's additional charge that reasonable doubt is "such a doubt as in the graver, more important transactions of life would cause an ordinary and prudent person to hesitate and pause." In the instant case, however, at no time did the trial judge correct the improper instruction in accordance with the Supreme Court's mandate in *Holland.* Consequently, the Court's reasonable doubt instruction constituted reversible error.

CONCLUSION

For the foregoing reasons, as well as those contained in the petition for writ of certiorari, petitioners pray that the Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

CLARK L. DERRICK, Counsel for the petitioners, certifies to this Court that this Petition for Rehearing is presented in good faith, and not for delay.

Counsel further certifies that this Petition is restricted to a substantial ground which was available to the petitioners, but which was not previously presented to this Court.

Clark L. Derrick
Counsel for Petitioners